No. 80-1316

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSETTE CLAIR BAUER, NEE GEISSER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

SIDNEY M. GLAZER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the United States was required under its plea bargain to refuse to extradite petitioner.

2. Whether the court of appeals properly reversed the district court's conclusion that the United States had not used its best efforts to avoid petitioner's extradition.

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The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 627 F. 2d 745. The prior opinions of the court of appeals remanding the case (Pet. App. 63a-86a, 32a-55a) are reported at 554 F. 2d 698 and 513 F. 2d 862. An earlier opinion of the district court following the first remand (Pet. App. 56a-62a) is reported at 414 F. Supp. 49.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1980 (Pet. App. 89a). A petition for rehearing was denied on November 6, 1980 (Pet. App. 91a). The petition for a writ of certiorari was filed on February 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On November 21, 1967, the United States District Court for the Southern District of Florida issued an order certifying that petitioner was subject to extradition to Switzerland to continue serving a sentence for patricide (Pet. App. 105a-106a). In May 1973, petitioner filed in the United States District Court for the Southern District of Florida a petition for a writ of habeas corpus to prevent her extradition. The district court granted relief (Pet. App. 28a-31a), and the court of appeals reversed and remanded (Pet. App. 32a-55a; 513 F. 2d 862). On remand, Switzerland was permitted to intervene, and in May 1976 the district court ruled anew that petitioner could not be extradited (Pet. App. 56a-62a; 414 F. Supp. 49). The court of appeals reversed and remanded the case for a second time (Pet. App. 63a-86a; 554 F. 2d 698). The district court in October 1979 again set aside the extradition order (Pet. App. 87a-88a). On appeal, the court of appeals vacated the decision of the district court and rendered a judgment that petitioner is subject to extradition (Pet. App. 1a-24a; 627 F. 2d 745).

The facts of this case are detailed in the three opinions of the court of appeals (Pet. App. 1a-7a, 63a-73a, 34a-44a). Briefly, in 1964 petitioner escaped from prison in Switzerland, where she had more than two and one-half years remaining of a sentence for aiding and abetting the murder of her father for financial gain. In 1967, she and an accomplice were arrested in Miami, Florida, and indicted for attempting to smuggle heroin into this country. While the United States Attorney was engaging in plea negotiations with petitioner and her companion, subsequent to their indictment, the government of Switzerland obtained an order certifying that petitioner was deportable. Shortly thereafter, the United States Attorney entered a plea agreement with petitioner and her companion under which it was agreed that they would reveal all they knew about the heroin conspiracy and would testify against their co-conspirators. In turn, the United States Attorney promised to reindict them for lesser offenses and to secure their parole after three years; in addition, the officials involved assured petitioner and her co-defendant that "we would do everything possible" to prevent the extradition of the defendants to Switzerland or France (Pet. App. 38a n.5).[1] Thereafter,

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[1]The testimony about the best-efforts aspect of the agreement included testimony from petitioner's attorney, James Jay Hogan, as follows (2 R. 53-52, 61-62; Pet. App. 111a-112a):

> Now, there was not absolutely a 100 percent deal that she would not be deported to Switzerland, as far as I remember . . . they could not say, "We won't deport her to Switzerland," because they didn't have the power. That was the State Department at that time, but they said, "We'll do everything we can."

One of the government attorneys who participated in the negotiations stated that he had told petitioner, co-defendant Lambert, and attorney Hogan that "we would do everything possible to see that they would be deported to a country other than Switzerland" (Pet. App. 38a n.5) and that, although he had not reviewed the relevant materials from his discussions some five years earlier, he felt that petitioner was "entitled

petitioner cooperated fully and was sentenced to the lesser offenses in accord with the agreement. She escaped from a federal prison in October 1969 and remained at large until June 1972. Because of her escape, the Department of Justice disavowed the plea agreement.

In August 1973, petitioner filed a habeas petition to compel performance of the agreement and prevent her extradition; the district court granted the petition. On appeal, the court of appeals found the record silent concerning any efforts by the Department of Justice to "influence the actions of the independent sister branch[] of the Government—the State Department" in its efforts to procure petitioner's extradition (Pet. App. 45a-46a). The court accordingly remanded for consultations with the State Department and the development of "the position of the United States Government" concerning petitioner's extradition (*id.* at 51a-52a). Further, if that position did not result in petitioner's release, the district court was to hold a hearing to determine what the government had done with respect to its "best efforts" promise in the event that Switzerland insisted on extradition (*ibid.*).

Following remand, Deputy Attorney General Harold Tyler wrote Secretary of State Henry Kissinger reporting the agreement, including a brief request that he assist in resolving the problem.[2] The State Department exchanged notes with the Swiss government,[3] and met with their representatives. The Swiss government nevertheless insisted that

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to believe that the United States Government would make every possible effort to see that they were deported to a country other than Switzerland" (*id.* at 40a n.5).

[2]The text of the exchange of letters between the Department of Justice and Department of State is set forth in the second opinion of the court of appeals (Pet. App. 67a-71a nn. 2, 3).

[3]The text of the notes is contained in the third opinion of the court of appeals (Pet. App. 17a-18a n.6).

a failure to grant extradition would violate the obligation of the extradition treaty and indicated that they continued to assert their rights under the treaty.[4]

After a hearing (in which Switzerland participated as an intervenor), the district court found that these actions by the government were "too little, and too late" to discharge its obligations (Pet. App. 61a). Upon an appeal by both the United States and Switzerland, the court of appeals, finding that the petitioner's fears for her life if she was extradited had been inadequately stressed to the Swiss government (Pet. App. 75a), was "not convinced that the vast powers of persuasion at the command of the Departments of Justice and State have been adequately applied to Bauer's cause" (Pet. App. 81a). Accordingly, the court again remanded the case to give the government "a reasonable time in which to use its 'best efforts' to prevent the extradition" of petitioner (*id.* at 81a-82a).

After this decision, the Secretary of State, in a diplomatic communication to the Swiss ambassador, requested that the government of Switzerland withdraw its extradition demand. That communication forwarded and adopted a detailed letter from the Deputy Attorney General, which, *inter alia,* stressed petitioner's fear for her life and her cooperation in an important narcotics prosecution.[5] When the Swiss government again refused to withdraw its request for extradition, two informal meetings were held in the Department of State. The Swiss ambassador then communicated again with his government in an attempt to get the government to withdraw its extradition request, but these efforts failed.

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[4]The text of the position of the Swiss government is also contained in the third opinion of the court of appeals (Pet. App. 19a-20a n.7).

[5]These letters are set forth in the third opinion of the court of appeals (Pet. App. 12a-15a nn. 4, 5).

Following these efforts, District Judge Mehrtens again vacated the extradition order. He directed that petitioner be released from any form of detention and be authorized to continue to reside permanently in the United States. The Judge characterized the efforts of the United States as "nominal" and "wholly inadequate to fulfill" the government's obligation under the plea bargain (Pet. App. 87a-88a). Shortly thereafter, the Department of State held a meeting with the Swiss ambassador and two of his aides, but was again unable to persuade Switzerland to withdraw its extradition request.[6]

The ensuing appeal of the district court's order by the United States and Switzerland led to the decision ordering petitioner's extradition, from which she now seeks review.

ARGUMENT

1. Petitioner asserts that this Court should grant review in order to establish that individual constitutional rights prevail over treaty obligations. But the court below did not dispute this abstract proposition. It expressly agreed that "a purported treaty obligation of the United States government cannot override an individual constitutional right" (Pet. App. 10a). Petitioner's disagreement with the court below thus turns on the application of that principle to the particular facts of this case. Petitioner bases her assertion of a constitutional right on the terms of her plea agreement as she interprets it—essentially, she claims that the agreement constituted an absolute commitment that she would not be extradited to Switzerland. On that basis, she argues that she has a constitutional right to enforce the plea agreement, which right overrides the Swiss government's treaty right to extradite her. But the court of appeals interpreted the agreement as requiring only that the government use its best

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[6]The memorandum of this meeting is contained in the opinion below (Pet. App. 17a-18a n.6).

efforts to avoid her extradition (Pet. App. 8a-9a). As the court explained, "[b]est efforts can only mean full pursuit of the cause through diplomatic channels in dealing with a friendly nation" (*id.* at 21a). The court carefully reviewed the record and concluded that "the government has requested, has tried to persuade several times, and has humbled itself to the Swiss government in its attempt to get the Swiss government to withdraw its request" (*id.* at 23a). On that basis, the court found that the terms of the plea agreement had been met, so that petitioner has no constitutional right inconsistent with her extradition pursuant to the requirements of the treaty.

Petitioner's fact-bound dispute over the terms of her plea agreement do not merit further review. In any event, the court of appeals' interpretation of the agreement is clearly correct. As the attorney who represented petitioner in the plea negotiations recognized (see note 1, *supra*), the authority of the prosecutors with whom the negotiations were conducted was limited. They had no power to bind the government not to fulfill its treaty obligations to Switzerland. In our view, the most reasonable construction of the prosecutors' promise to "do everything possible" to prevent petitioner's extradition to Switzerland is that the Department of Justice would intervene on petitioner's behalf with the Department of State. The court of appeals required more than this, treating the promise as committing the United States Government in its dealings with Switzerland, and that broader requirement has been satisfied.

Petitioner incorrectly suggests (Pet. 14-15) that the language of the extradition statute, 18 U.S.C. 3186,[7] permits the Secretary of State to decide on humanitarian grounds

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[7]The statute provides in pertinent part that "[t]he Secretary of State may order the person * * * to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged."

not to extradite petitioner despite the insistence of Switzerland that we are bound by the Treaty, which contains no such exception. As the court of appeals recognized in its initial opinion (Pet. App. 52a n.22), the Secretary of State may well have limited discretion not to extradite in appropriate cases. See, *e.g.*, *Sindona* v. *Grant*, 619 F. 2d 167, 176 (2d Cir. 1980); *Wacker* v. *Bisson*, 348 F. 2d 602, 606 (5th Cir. 1965); Note, *Executive Discretion in Extradition*, 62 Colum. L. Rev. 1313, 1328 (1962). The power to refuse to extradite on humanitarian grounds, however, "exist only when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave injustice." *Peroff* v. *Hylton*, 542 F. 2d 1247, 1249 (4th Cir. 1976), cert. denied, 429 U.S. 1062 (1977).[8] The extradition of petitioner to complete service of a sentence for the murder of her father is neither persecution nor a grave injustice.

2. Petitioner further argues (Pet. 16-20) that the court of appeals acted improperly when it set aside the findings of the district court that the United States had not used its best efforts to avoid her extradition. She asserts that the district court's findings were factual findings that should not be overturned unless clearly erroneous. Even assuming that is the applicable standard,[9] we submit that the ruling of the district court was properly reversed.

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[8]Peroff, who had entered into a witness protection agreement with the Department of Justice, contended, like petitioner, that his extradition would endanger his safety. The court of appeals responded, "[i]f there are potential assassins in [the foreign country's] prisons, it is for [that country] to take measures adequate to secure Peroff's safety and protection. There is no reason to suppose that [the country] cannot do whatever is required to assure Peroff's safety" (542 F. 2d at 1249). The same is true here.

[9]Although the court of appeals agreed on the second appeal that this was the applicable standard (Pet. App. 78a), we submit that where, as here, there is no dispute concerning what the government has done to comply with the agreement, and the question is solely whether those

The uncontradicted evidence showed that the United States urged the Swiss to consider both petitioner's invaluable service to the world community in giving evidence against a large international narcotics conspiracy, and her fears that her custody in Switzerland would expose her to reprisals for that cooperation.[10] These communications corrected the defects pointed out by the earlier opinions of the court of appeals in the documents previously given to Switzerland: the new representations emphasized petitioner's intense fear of reprisal, stated that government agents considered her fear to be well-founded, and stressed her admirable performance of her part of the agreement. In response, the Swiss government conferred with the local Cantons responsible for carrying out the remaining portions of petitioner's sentence concerning her fears for her safety. Thereafter, appropriate officials of both Cantons gave their assurances that petitioner would be safe in Switzerland, noting that the prison in which she would be held has an outstanding record of safety and that all actions necessary for her safety would be taken. It was clearly erroneous for the district court to characterize the action of the United States as "nominal efforts" (Pet. App. 88a).[11] The court of appeals, therefore, properly set aside the decision of the district court.

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efforts are legally sufficient to meet its obligations, the issue is one of law to which the clearly erroneous standard does not apply. Similarly, there is no merit to petitioner's suggestion (Pet. 19) that it was necessary to take further evidence to determine whether the government's efforts, reflected in the documentary submissions, satisfied the "best efforts" obligation of the agreement.

[10]Petitioner has never suggested any other contention that could reasonably have been advanced in order to persuade the Swiss not to insist upon her extradition.

[11]Petitioner incorrectly asserts that the United States never expressed a sincere and unqualified belief that petitioner should not be extradited (Pet. 18). The letter of the Deputy Attorney General to the Department of State strongly urged that petitioner not be extradited. The State

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

SIDNEY M. GLAZER
Attorney

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Department in turn made diplomatic efforts, which the court below properly characterized as "indicat[ing] a measure of humiliation", in its efforts to get the Swiss government to forego extradition (Pet. App. 21a-22a). Indeed, the State Department even persisted with a meeting with Swiss officials after the last adverse ruling of the district judge. In short, the United States sincerely tried to persuade Switzerland to withdraw its deportation request. It was not inconsistent with this endeavor to take the position before the courts that the terms of the agreement with petitioner had been complied with.

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